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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. [redacted] 144

T. EUGENE THOMPSON,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Citation to Opinions of the Court Below

The opinion of the Supreme Court of Minnesota is reported at 139 N.W. 2d 490. An earlier opinion of the Supreme Court of Minnesota in the same case is reported at 266 Minn. 395, 123 N.W. 2d 378.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3).

United States Constitutional Provisions

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minnesota Constitutional Provisions

Article I, §6

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

Minnesota Statutes, 1961

"627.01 Place of trial; change of venue

Every criminal cause shall be tried in the county where the offense was committed, except as otherwise provided by law, unless it shall appear to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had in such county, in which case the court before whom the same shall be pending, if the offense charged in the indictment is punishable with death or imprisonment in the state prison, may direct the person accused to be tried in some other county, in the same or any other judicial district in the state, where a fair and impartial trial can be had; but the party accused shall be entitled to one change of venue only."

"631.02 Continuance; defendant committed, when

When an indictment shall be called for trial, or at any time previous thereto, upon sufficient cause shown by either party, the court may direct the trial to be postponed to another day in the same term, or to another term, and all affidavits read upon the application shall be filed with the clerk at the

same time. When a defendant who has given bail shall appear for trial, the court may, in its discretion, at any time after such appearance, order him committed to the custody of the proper officer of the county, to abide the judgment or further order of the court."

Rules of the United States Supreme Court

Rule 23 1. (f)

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment or error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

* * *

Questions Presented for Review

I

Press Coverage

(1) Where petitioner complains that his federal rights were abridged because he was tried at the time and place of his choice, and chose to assert no right in this connection in the state trial court, is the issue before this Court?

(2) May material be considered by this Court, if it was not part of the record certified by the lower court nor considered by that court?

(3) Was Petitioner deprived of any Due Process Rights by reason of alleged prejudicial press coverage:

(a) Where the offense occurred in one county and the case was transferred to another county for trial, and no prejudicial press coverage was shown in the county of the trial?

(b) Where press coverage actually shown consisted of reports of police investigations, arrests of suspects, and court appearances and contained no editorial comments, cartoons, nor mention of petitioner's extra-marital affair, although the last was shown at the trial?

(c) Where all of the 14 jurors selected to hear the case indicated that they had no opinion on petitioner's guilt or innocence?

(d) Where less than one fifth of the jurors questioned on voir dire indicated a feeling of petitioner's guilt?

II

Conspiracy—The Evidentiary Question

Was petitioner deprived of a federally protected right where a prima facie showing of a conspiracy was made and thereafter the state trial court admitted out of court declarations of a co-conspirator?

III

New Trial on Ground of Newly Discovered Evidence

Was Petitioner deprived of a federally protected right when the state trial court refused to grant a new trial on the

basis of newly discovered evidence, where the newly discovered evidence consisted of:

(1) Material which would go only to the credibility of witnesses, and,

(2) A recantation by a prosecution witness, who repudiated the recantation in open court?

Statement of the Case

The facts of the case are fully and accurately set out in the opinion of the court below, 139 N.W. 2d 490, appendix A of the petition herein, and respondent, pursuant to Rule 40 (3), waives the statement of the case except to point out the following: Pages 13 through 23 of the petition herein are taken from a letter, found on the person of the witness Anderson while he was in prison, and from an ex parte statement taken from Anderson by petitioner's counsel at the prison. As pointed out by the court below, both the letter and statement were repudiated by Anderson in a hearing on a motion for a new trial based on newly discovered evidence. At the hearing, Anderson reaffirmed the testimony given at the trial court, testifying that the letter and statement both resulted from threats he had received while at prison. (R. Vol. 8, p. 461, 474-476). The trial court, denying the motion, found that the letter and statement did in fact result from threats. (R. Vol. 1, p. LXXXIV). Petitioner's appeal from the denial of this Motion was consolidated with his appeal from the judgment, and both appeals were heard together by the court below.

ARGUMENT

Petitioner presents three issues to this Court which he says are of constitutional dimension and should be reviewed on a writ of certiorari. However, a careful reading of the petition shows that the courts below did not deny petitioner any federally protected rights. The petition, prepared by a member of the Bar of this Court with the aid of the petitioner's brother, seems to be directed more to engaging in repeated and calumnious personal attacks on the prosecutor than the raising of genuine constitutional issues. Like most personal attacks presented as arguments on the merits:

". . . . [I]t is a tale
. . . full of sound and fury,
signifying nothing."
—Shakespeare: Macbeth

I

Press coverage of the investigation and trial are not grounds for granting a writ.

A. The issue was not asserted in the trial court and therefore is not before this Court.

Petitioner was indicted for the offense in Ramsey County (St. Paul), Minnesota on June 25, 1963. (R. Vol. I, p. I). On August 27 petitioner moved to change the venue to Hennepin County (Minneapolis), but the motion was denied. However, on September 13, 1963, the Minnesota Supreme Court granted a writ of mandamus setting the venue in Hennepin County. *State v. Thompson* (I), 266 Minn. 385, 123 N.W. 2d 378 (1963). This decision determined that the trial would be held in Minneapolis, the largest city in Minnesota, and in the county of petitioner's choice. The record clearly shows that after the venue was changed to Hennepin County petitioner did not request either a continuance or a second change of venue, and the case proceeded in due course to trial.

Petitioner now urges that his Due Process Rights were violated because the case proceeded regularly to trial in Hennepin County. Assuming, without conceding, that petitioner was deprived of a federally enforceable right by being tried at the time when and place where he was tried, he did not assert any such right in the trial court. The rule in such a case is that if a litigant in a state court does not assert a federally protected right in the state trial court, he is deemed to have waived the right. Such a waiver binds the litigant and precludes him from a decision on the merits of the federal claim either in the state appellate court or before this Court. *Henry v. Mississippi,* 379 U.S. 443, 451 (1965).

In this connection, Supreme Court Rule 23 (1) f. requires a petitioner to specify the stage in the proceedings in the court of first instance at which, and the manner in which, the federal question was raised, as well as the method of raising them, ". . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Petitioner's failure to comply with this rule is apparent. He claims he had a federal right not to have been tried at the time and/or place he was tried, yet made no attempt to change either the time of the trial by motion for continuance (Minn. Stat. 631.02) or the place of the trial by motion for change of venue (Minn. Stat. 627.01)*

*Although the cited statute is susceptible to a construction that it allows only one change of venue, the clear implication of the holding of *Irwin v. Dowd* (II) 366 U.S. 717 (1961) is that such a construction would violate a defendant's Fourteenth Amendment Due Process Rights, if in the county to which the venue had been changed, a fair trial was impossible. It should be noted that *Irwin* (II) was cited by the Minnesota Supreme Court in its decision when it changed the venue of this action to Hennepin County. *State v. Thompson* (I) 266 Minn. 385, 389, 123 N.W. 2d 378, 381, (1963). Cf. also the statement by the Minnesota Supreme Court in its decision on this appeal to the effect that the cited statute would not be construed to prevent a second change of venue. 139 N.W. 2d at 514.

Petitioner was free to make either motion at any point during the voir dire, as soon as he realized, as he now claims, that an impartial jury was impossible. At such a point, remedial action would be meaningful in that it would correct the situation without the necessity of a new trial. Petitioner again had the opportunity to raise the issue in his three motions for new trial, but did not do so." (R. Vol. I, pp. LVIII-LXI, pp. LXV-LXVI, pp. LXX - LXXIV).

Petitioner concedes that the matter was not raised in the trial court, as required by *Henry* and Rule 23 (1) f. (Petitioner's brief, p. 32-34). He seeks to remedy this by a number of devices. First, he cites *Irwin v. Dowd* (I), 359 U.S. 394 (1959) apparently for the proposition that if any state court reaches the merits on a constitutional question, it is deemed raised for the purpose of review by this Court. This is a complete misreading of *Irwin,* in which the issue was whether or not the petitioner had exhausted his state court remedies for the purpose of filing a writ of habeas corpus in the federal district court. This Court held that if the state supreme court discussed the merits of a constitutional claim in such a way as to settle it, but technically held that the issue need not be decided, then the matter is deemed to have been exhausted by the state courts, and the petitioner may then petition for a writ of habeas corpus in federal court. It can be seen that *Irwin* in no way relates to the question of raising issues in time for the state courts to rule fairly upon them. It deals not with the raising of issues, but with the settling of them. In fact, while in the state court, the petitioner *Irwin* sought and received one change in venue, but then moved unsuccessfully three more times for a change of venue and eight times for a continuance. See *Irwin v. Dowd* (II), 366 U.S. 717, 720 (1961). Clearly the issue was raised in the

trial court. This, of course, is in contrast to the case at bar, where petitioner neither moved to change the venue nor continue the action once the venue was changed to Hennepin County. Respondent submits that *Irwin* in no way relates to the issue and that the proper rule is set out in *Henry v. Mississippi, supra,* and Rule 23 (I) f.

It should be noted that the Minnesota Supreme Court did not discuss the Fourteenth Amendment due process issue, as petitioner contends. The court discussed the issue of a fair trial before an impartial jury, which right is guaranteed all defendants by Art. I, §6 of the Minnesota State Constitution. The Minnesota Court found that since petitioner had selected the location of the trial, there was no alleged error upon which it could rule.

> ". . . [H]aving gone as far as we did in this case in permitting the defendant to choose his own county, we do not know what more we could have done." 139 N.W. 2d 514.

Finally, petitioner attempts to gloss over his refusal to present the issue to the trial court by blaming the state for not continuing the action or removing it to federal court. These procedures, while perhaps helpful to this petitioner, would certainly be considered extremely harmful by other criminal defendants. Any doctrine which gives the prosecution the power to continue actions indefinitely would certainly violate a defendant's right to a speedy trial, as guaranteed by Minnesota Constitution, Art. I §6, and the United States Constitution, Sixth Amendment. The right to a speedy trial is for the accused's benefit, and he alone should be allowed to waive it. The other improvement on criminal procedure suggested by petitioner—removal to the federal court

on motion of the prosecution—is so fanciful as to defy analysis.

Respondent submits that since petitioner chose not to assert in the trial court any federal right concerning alleged prejudicial press coverage, he has waived any such right, and is precluded from a decision on the merits of the claim before this Court.

B. The issue of press coverage is not fairly raised in the record before this Court.

Almost all of petitioner's argument on the issue of press coverage is based on material outside the record. When material not presented to the lower court and not certified to this Court is presented for review, it has long been the rule that such material may not be considered by the Court. Thus, in *Lawn v. United States,* 355 U.S. 339 (1958), petitioners were convicted of income tax violations and the convictions affirmed by the court of appeals. When the case came before this Court on certiorari, the Government filed with the Court a transcript which was not part of the record of the lower court. Petitioner Lawn moved to strike the transcript and the portion of the Government's brief relating to it. This Court granted the motion saying:

> "That motion must be sustained as we must look only to the certified record in deciding questions presented." *Id.* at 354.

The dissent agreed with this ruling. *Id.* at 366.

This rule is not new. Over sixty years ago, this Court held:

> [B]ut before the questions presented and decided at such a [lower court] hearing can be re-examined on a writ of error, they must be brought into the record, by a bill

> of exceptions or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose. . .
> . . . The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. . ."
> *England v. Gebhardt,* 112 U.S. 502, 505 (1884).

In *Ciucci v. Illinois,* 356 U.S. 571 (1958), the defendant had been convicted of murder in the first degree in a state court. Upon affirmance by the state supreme court, the matter came before this Court on certiorari. In his brief to this Court, the petitioner appended a number of articles which had appeared in Chicago newspapers prior to the trial of the cause. "Neither these articles nor their subject matter [was] included in the records certified to this Court from the Supreme Court of Illinois." 356 U.S. 573. In a per curiam opinion, this Court affirmed the conviction. The majority opinion noted:

> "Mr. Justice Frankfurter and Mr. Justice Harlan, although believing that the matters set forth in the aforementioned newspaper articles might, if established, require a ruling that fundamental unfairness existed here, concur in the affirmance of the judgment because this material, not being part of the record, and not having been considered by the state courts, may not be considered here." *Ibid.*

In his petition to this Court, petitioner has referred to the following matters outside the record:

(1) Appendices to the petition:

> (1) Appendix D. 42 extracts from St. Paul newspapers.

(2) Appendix E. An article in the *Saturday Evening Post* magazine, September 14, 1963.

(3) Appendix F. An article in *Newsweek* magazine, July 1, 1963.

(4) Appendix G. An article in a St. Paul newspaper, April 14, 1966.

(2) Items not certified as part of the record by the Minnesota Supreme Court, one of which was filed by petitioner with this Court:

(1) Petitioner's pro se "Brief and Affidavit," admittedly not part of the record. (Petitioner's Brief, p. 33).

(2) Transcript of voir dire jurors not selected, "certified" by the court reporter, but not by the Minnesota Supreme Court, as it was not filed by petitioner there nor was it considered by that court. It, too, is admittedly not in the record. (Petitioner's brief p. 34).

The rule that matters not in the record will not be considered by the reviewing court is not based solely on a sense of fairness, first, to the lower courts in allowing them to rule before they are reviewed and, second, to the other parties by allowing them to rebut material on the record against them. It is also based on the pragmatic reason that material eased into the files at the last minute has not been refined by earlier litigation and may not be as accurate as it might be had it been put in the record in the course of trial. The case at bar shows that such reasoning is well founded. Thus, petitioner's appendix E, the *Saturday Evening Post* article which petitioner solemnly represents as "reproduced in full" (petitioner's brief, p. 30) leaves out the following subtitle written in large print at the top of page 76, immediately over the

picture of petitioner: "I PRAY THE GUILTY WILL BE BROUGHT TO JUSTICE." It also leaves out certain pictures of petitioner in both his home and office which were obviously taken with his consent.

All the appendages in appendix D are excerpts. Some, like A3 and A4 have excised portions not indicated by ellipses. Since all are excerpts, they must necessarily represent a process of selection and concentration. Appendage A26, which petitioner represents is on page 24 of the *St. Paul Dispatch* of June 19, 1963 is not on page 24 or on any other page of that edition, nor is it on page 24 of the June 17, June 18, June 20 or June 21 editions of that paper. Perhaps with a more careful citation it might be found, but as it is presented to this Court, respondent is unable to locate the alleged article. Appendage A1, although it is presented in the petition as relating to petitioner's case, when read in its entirety is found to be a news article of a study, opposing capital punishment, released in Chicago on the date the story was printed. It in no way relates to petitioner. The First Amendment dangers of suppressing such a story as prejudicial to petitioner are apparent. The second paragraph of appendage A6 is not found in the same article as is the first paragraph of the same appendage (or anywhere else in the same article for that matter) although petitioner makes it appear as if the two paragraphs are consecutive.

Appendages A14, A31, and A38, presented to this Court as separate news articles, are in reality three excerpts from the same article. Appendages A13 and A30 are from another single article. Appendages A15 and A32 are similarly treated. And Appendages A6, A7 and A8, although also presented as three different articles (complete with three different headlines) are in reality three excerpts from the same article.

The transcript of the voir dire of jurors not selected, along with the record of jurors selected, could be read to be a complete transcript of all that occurred between October 28 and November 1, 1963. It omits much of what in fact occurred, including the trial court's instruction to the press and jury about their conduct during the trial.

Other distortions and omissions occur, but the above discloses the basic evil of which respondent complains: Since the matter is not in the record, it is not presented to this Court with the highest degree of accuracy.

Therefore, on the authority of *Ciucci v. Illinois, supra,* respondent hereby moves to strike all of Appendix D, Appendix E, Appendix F, and Appendix G; and on authority of *Lawn v. U. S., supra* and *England v. Gebhardt, supra,* moves to strike from the record respondent's pro se "brief and affidavit" and the transcript of voir dire of jurors not selected. Respondent further moves, on the authority of the above cited cases, to strike all references to all the above material in petitioner's petition. If respondent's motion is granted, it will be clear that the records certified to this court will show that no federal right of petitioner was abridged, as the material portions consist of a voir dire of fourteen jurors, none of whom had any opinion as to the guilt or innocence of petitioner.

C. Even if the material outside the record is considered, no federally protected right of petitioner was abridged.

Respondent urges that the issue of press coverage was not seasonably raised and that it is not embodied in the record before this Court. Assuming, arguendo, that it had been raised seasonably, and further assuming that it had been embodied in the record, no federally protected right of petitioner

was abridged. The following analysis is presented on the assumption that this Court denies respondent's contentions in Section IA and IB above, and respondent in no way intends to waive either of these contentions.

At the outset, it should be noted that Due Process does not require that the jury be totally ignorant of the cause:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and *scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.* This is particularly true in criminal cases." *Irwin v. Dowd* (II), 366 U.S. 717, 722, 723 (1961) (Emphasis supplied).

Moreover, Due Process is not offended if a juror has a preconceived notion of the guilt or innocence of the accused, provided that the juror can honestly lay the impression aside.

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

1. The examples of alleged prejudicial press coverage did not reach the jury.

Petitioner has set out 42 excerpts from St. Paul daily newspapers and two articles from national magazines.* Of the

*Appendix G, a newspaper article dated April 14, 1966, is, as opposed to the other appendages to the petition, accurately reproduced. However, as it is of dubious relevance to the case, it will not be discussed.

twelve jurors who deliberated on the case and returned the verdict, none were shown to have read any of the newspaper articles of which petitioner complains, or even any St. Paul newspapers, for that matter. Five were asked whether they had read about the case in the St. Paul papers. All replied they had not. (R. Vol. 8, pp. 96, 128, 169, 176, 191). This is in contrast to *Sheppard v. Maxwell*, 34 U.S.L. Week 4451 (U.S. June 6, 1966) in which seven of twelve jurors received the offending newspapers. Two jurors had read the article in the *Saturday Evening Post*. (R. Vol. 8, p. 104 and 105, 221). One had not read the article but had looked at the pictures (R. Vol. 8, p. 202, 222). None were shown to have read the *Newsweek* article. Thus, the "massive" publicity which petitioner brings to the attention of this Court consists of one magazine article, published almost three months before the verdict was returned, read by two jurors and glanced at by a third.

An examination of the proceedings in the trial court shows what had happened. Petitioner evidently felt that the publicity in St. Paul was prejudicial; he has appended examples of such St. Paul publicity to the petition. On petitioner's motion, venue was changed to Hennepin County, the seat of which is Minneapolis. Minneapolis is a larger city than St. Paul and has two newspapers of its own, *The Tribune* and *The Star*. (See R. Vol. 8, pp. 190, 201). The wisdom of petitioner's move was obvious; none of the jurors selected had read the St. Paul papers. Only seven of the one hundred and twelve jurors questioned on the voir dire had read the St. Paul papers, (Scheid transcript, not in record). It should be noted that petitioner has not appended to his petition any excerpts from the two Minneapolis newspapers, i.e., the papers which serve the area from which the jurors were drawn.

In this connection, it should also be noted that petitioner does not allege that there was prejudicial press coverage during the trial (Cf. *Sheppard v. Maxwell, supra*), or even in the period immediately preceding it. The selection of jurors started October 28, 1963. The last article selected by petitioner is the *Saturday Evening Post* article dated September 14, 1963. The last newspaper excerpt selected by petitioner was published on August 26, 1963, while the great bulk of the excerpts were published in April, May and June, 1963, at least four months before the case proceeded to trial.

It is clear that petitioner has failed—even by roving far beyond the record—to set out any press coverage which reached the jury with such impact as to deny him due process.

2. *The content of the pre-trial press coverage was not of such a nature as to deprive petitioner of Due Process.*

In contrast to *Irwin v. Dowd,* (II), *supra,* and *Sheppard v. Maxwell, supra,* the press coverage set out by petitioner contains no editorials urging that he be arrested and prosecuted or that he be "grilled". No cartoons against petitioner appeared. There was no mention of any confession, prior criminal record, or offers to plead guilty to a lesser offense (as there were in *Irwin*), as petitioner had made none. There was no mention of petitioner's extra-marital affair with Jackie Oleson, even though evidence of this affair was properly introduced and received at the trial.

As the appended excerpts show, the pre-trial press coverage consisted of reports of the progress of the police investigation, of the arrest of suspects, and of the preliminary court appearances. If any news reporting of criminal cases is to be suppressed, the most caution should be exercised in sup-

pressing these reports. The dangers attendant on suppressing stories of arrests, custody, and court appearances are apparent.

A reading of the excerpts appended to the petitioner, selected and concentrated as they are, shows that the press coverage was not nearly of the order of *Irwin* and *Sheppard*. Even if it be assumed that the appended articles had been read by the jurors who sat on the case, the content of these articles was not of such a nature as to implant in them an unconscious prejudice against defendant.

3. *None of the jurors who sat on the case indicated any bias against petitioner.*

In contrast to *Irwin v. Dowd* (II), *supra*, where eight of the twelve jurors thought that the defendant was guilty, 366 U.S. 727, all of the jurors who sat on this case stated that they had no opinion as to petitioner's guilt or innocence, when questioned during the voir dire. Three admitted an opinion at one time, but stated they had given it up. It is true that such statements must be considered in light of all the factors surrounding the trial, but the contrast with the *Irwin* jury is apparent. The *Irwin* jurors stated that they could be fair and impartial to Irwin but eight of them stated with an opinion of guilt. In contrast, not only did all of the jurors in this case state that they could be fair to petitioner, they went further and stated that they had no opinion as to his guilt or innocence.

4. *An analysis of the voir dire does not show a deep and bitter prejudice against petitioner.*

Two points should be noted in this connection. First, neither 83% nor 65% of the prospective jurors questioned

were shown to be actually biased against petitioner, as he contends. Respondent agrees with petitioner that 112 prospective jury men were questioned. However, in no way is the relevant total either 81 or 103 as petitioner argues. His mathematical computations seem to bear no relation to his reasoning. Analysis of the voir dire panel in this connection is for the purpose of determining how many of the persons questioned are biased against the defendant, as a rough way of measuring community feeling. In this respect, it is similar to a public opinion poll. The relevant total is the number of persons who are asked, and who respond to, the question concerning any bias concerning the defendant. Once they answer this question, their opinion is registered and it is irrelevant whether or not they are later excused for miscellaneous reasons such as elderliness or health or whether or not they are challenged by the prosecution because they are related to the family of the decedent. It is also irrelevant if they are later challenged peremptorily by either side. Hence, here the relevant total is the number of prospective jurymen who are asked whether they had any opinion as to petitioner's guilt or innocence, which number here is 109. Of these, 66 stated that they had an opinion as to petitioner's "guilt or innocence," while 43 affirmatively indicated that they had no opinion. Of the 66, 20 indicated that it was a feeling of guilt while 46 did not specify whether their feelings were either guilt or innocence. Petitioner's statement that 67 talesmen expressed an opinion petitioner was guilty is a misstatement of fact. Thus, about 61% had *an opinion* on petitioner's guilt or innocence, while about 18% —not 83% or 65% as petitioner avers—expressed an opinion that he was guilty. This is in contrast to *Irwin*, where almost 90% of those examined "entertained some opinion as to guilt," 366 U.S. 727.

It may be that there is a material discrepancy between the figures supplied by respondent and petitioner. If so, this is one of the attendant hazards in considering material not on the record, and respondent urges this an additional reason to grant its motion, *supra* IA, to strike all the material not in the certified record.

The second point which should be considered in this connection is that a number of jurors challenged for cause could have actually sat on the jury without denying petitioner Due Process. Due Process does not require that a jury have a totally blank mind; it allows a preconceived notion of guilt or innocence, provided the jurors can honestly lay it aside. *Irwin v. Dowd,* quoted *supra.*

> "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him." Chief Justice Marshall, 1 Burr's trial 406 (1807), quoted in *Irwin v. Dowd,* supra, 366 U.S. at 722.

Although petitioner assures us that 67 jurors were challenged for cause because they expressed an opinion that he was guilty, of the total of 68 who were challenged by both sides for cause, one was challenged by petitioner apparently because he was related to Minneapolis police (Scheid transcript, p. 276). One was challenged by petitioner because she worked in a neighborhood in St. Paul not far from where the murder occurred (*Id.* at 465), and one was challenged by respondent because of a relationship to the decedent (*Id.*

at 134, 139). The remaining 65 were challenged for cause because of an opinion they had concerning the guilt or innocence of petitioner.* Of these 65, respondent opposed two challenges, but the triers found the challanges true. The other 63 challenges were not opposed by respondent. Some of these, however, had the challenge been found not true, could have sat on the jury without denying petitioner any Due Process rights, because their "opinions" appeared to be nothing more than preconceived notions about the case. Thus, in the questioning of juror LaVonne L. Blount, the following took place:

> "Q. I take it from what you read, you formed some opinion as to this man's guilt in this case, have you not?
>
> "A. Sort of general.
>
> "Q. You have some feeling, do you, about his guilt as you sit here today?
>
> "A. (Pause) Well, yes, some way or other.
>
> "Q. And you feel it would take— In your mind it would take some evidence to remove that opinion, is that right?
>
> "A. Yes." (*Id.* at 15, 16)

In the questioning of Beulah G. Callahan, the following occurred:

> "Q. I take it you formed some opinion as to the guilt of this man as a consequence of your reading?
>
> "A. Yes, I would say I have.
>
> "Q. And it would be that kind of opinion which would take evidence to remove? In other words, you feel that you would have to hear something to the contrary before you could change that opinion?

*The other juror who expressed an opinion and is included in the sixty-six figure of those with an opinion, *supra*, was juror Ann Duff, who had a "Sort of an opinion," which would not take any evidence to remove. (*Id.* at 279). She was not challenged by petitioner for cause, but was peremptorily challenged by him. (*Id.* at 279, 280).

"A. I would say so." (*Id.* at 112)

The questioning of juror Gladys C. Peterson:

"Q. Have you formed some opinion as to the guilt or innocence of Mr. Thompson based upon what you have read in the papers and in the Saturday Evening Post?

"A. No, not—. I just don't know.

"Q. Do you have some feeling in your mind one way or the other in regard to this matter.

"A. Oh, yes, in a way. It's just like watching a TV program that's being postponed until next week or something.

"Q. And you haven't quite reached the answer to it yet, but you have some ideas in your mind about this matter, do you?

"A. Yes.

"Q. And you would want to have those ideas overcome in this courtroom before you would be satisfied, is that right?

"A. Yes.

"Q. I take it then that you don't have a competely open mind about the matter, having these ideas?

"A. No, I can't say that I do." (*Id.* at 407, 408).

Of course, all of the above answers were given without any instruction by the trial court as to the presumption of innocence and the burden of proof beyond a reasonable doubt. These statements show hardly more than a preconceived notion as to guilt or innocence which the Fourteenth Amendment allows, and these jurors could have sat without offending Due Process. Thus, the figures of 65 as those challenged because they had an opinion on the case is as high as it is because respondent did not insist on asserting all it could have consistent with Due Process, but instead agreed to a higher standard, that of not opposing challenges to those jurors who had a mere preconceived notion of the

guilt or innocence of petitioner. As a result of respondent's position, petitioner was not compelled to use as many peremptory challenges as he might have, had respondent not acquiesced in his challenges. Thereby, when the jury selection was completed, petitioner had not exhausted all his peremptory challenges. (See Scheid transcript).

In conclusion, respondent reminds the court that criminal cases are not tried in a vacuum and that the press will, and has a right to, cover these cases. *Irwin v. Dowd, supra,* 366 U.S. at 722, 723. In light of these facts, respondent submits that petitioner has fallen well short of any showing that his Due Process rights were violated.

II

The admission of a co-conspirator's declaration did not violate any of petitioner's federally protected rights.

Petitioner urges that certain out of court declarations of Norman Mastrian were erroneously admitted in evidence, apparently in violation of petitioner's Due Process rights. His reasoning is not made clear, but since he is relying on the Sixth and Fourteenth Amendments, it is apparently as follows: (1) The Sixth Amendment's Right to Confrontation applies to the states by virtue of the Fourteenth Amendment Due Process clause. (2) The admission of Mastrian's declarations was in violation of the Right to Confrontation.

Respondent agrees that the Sixth Amendment's Right to Confrontation applies to the states by virtue of the Fourteenth Amendment Due Process clause. This was settled beyond peradventure in *Pointer v. Texas*, 380 U.S. 400 (1965). The question is whether the admission of this testimony would violate the Sixth Amendment were it introduced in federal court.

The general rule on conspiracy evidence in federal courts is set out in *Lee Dip v. United States*, 92 F. 2d 802 (9th Cir. 1939), cert. denied, 303 U.S. 638, in which the court held:

> "Where there is proof of concert of action between two or more persons in the commission of an offense, the acts and declarations of one are admissible against the other, although no conspiracy has been charged." 92 F. 2d 803.

Accord, *United States v. Annunziato*, 293 F. 2d 373, 378 (2d Cir. 1961), cert. denied, 368 U.S. 917. Cf. also *United States v. United States Gypsum Co.*, 333 U.S. 364, 393 (1948), (Civil Action under the Sherman Act). Only a prima facie showing of the conspiracy need be made. *Hansen v. United States*, 326 F. 2d 152, 156 (9th Cir. 1963). Cf. *United States v. United States Gypsum Co., supra*, 333 U. S. at 389.

The above federal rules are identical with the general rules on the topic, 16 Am. Jur. 2d, Conspiracy, §38, p. 147, and with the Minnesota rules, *State v. Thompson* (II), *supra*, 139 N.W. 2d at 502, 503.

Thus even assuming for the purposes of this petition that the Sixth Amendment incorporates the entire federal practice with respect to hearsay rules, and the Fourteenth Amendment applies them to the States, no change will be effected in Minnesota law. As can be seen from the opinion of the court below, the law which has already been applied to this case is identical to federal law. What petitioner is asking this Court to do is reapply the law already twice applied to the case.

Respondent submits that a prima facie showing of conspiracy was made out, aliunde the Mastrian declarations. As petitioner concedes, it was shown that Carol Thompson was murdered on March 6, 1963. Petitioner was not at the scene

of the crime. Could the trial court, without using the hearsay declarations, make a finding that petitioner was working in concert with whoever it was that committed the murder? The following, most of which appears in the opinion of the court below, should be considered in answering this question:

(1) There was $1,061,000.00 in insurance on decedent's life, payable to petitioner in the event of her accidental death. $1,055,000.00 of this was taken out by petitioner within 13 months of the offense, which was committed on March 6, 1963. The expiration dates of the term policies amounting to $705,000.00 were March 15, April 4, April 10, May 1, June 1, and June 13, 1963. (139 N.W. 2d 496, 517). Petitioner spread these term policies over three different agents, taking out no more than $350,000.00 with any one. (*Id.* at 517). He made misrepresentations to the agents to the effect that there was less insurance on decedent's life than there in fact was. (R. 202; St. Ex. Z, R. 530; St. Ex. II, R. 580; St. Ex. EE, R. 540).

(2) January 24, 1963 petitioner removed the family Dachshund which acted as a watch dog because it barked whenever visitors approached the house. (R. 680-82, 859). This was done without decedent's knowledge. (R. 2339-40).

(3) March 4, 1963, petitioner removed one of the two telephones from the home. (R. 2024, 2025). Regardless of Anderson's testimony on this matter, it remains that decedent might have used this phone, which had been located in the bedroom, (R. 670) to summon aid.

(4) Petitioner was involved with Jackie Oleson and asked her to marry him in August, 1962. (R. 735). In February, 1962, petitioner asked Jackie for 11 or 12 months to arrange his affairs to be able to divorce the decedent. (R. 768)

(5) Petitioner's early arrival at his office (139 N.W. 2d 503) on the date of the offense. Regardless of Anderson's testimony, an inference that petitioner wanted an alibi arises.

(6) Petitioner locked the front door of the house on the date of the offense, which was extremely unusual. (*Ibid.*)

(7) Petitioner had numerous phone calls from, and several meetings with, Norman Mastrian, who began soliciting for a hired killer in February, 1963. (*Ibid.*) (Mastrian's statements in ths respect are verbal acts and are admissible with respect to the conspiracy rule.)

(8) March 20, 1963, petitioner paid $2,500.00 in $100.00 bills to Mastrian through another attorney. Although he explained that this was the return of a retainer from Mastrian, petitioner admitted that he had done considerable work for Mastrian yet had had no accounting with him. (*Ibid.*) Petitioner's argument that using another attorney would leave evidence cannot gloss over the fact that this is a most unique way to return a retainer. Most lawyers use checks, but checks have to pass through numerous hands in banks and other financial institutions. The use of a third party to pay cash, rather than make a face-to-face payment from petitioner to Mastrian, is the obvious result of a plan to have petitioner and Mastrian avoid each other after the accidental death scheme fell apart.

(9) Petitioner had numerous stock transactions with Mastrian which resulted in substantial loss to petitioner and a gain to Mastrian. (*Ibid.*)

The trial court and the Minnesota Supreme Court, applying identical rules as are applied by federal courts, found a prima facie showing was made. Petitioner has offered explanations and justifications for much of the above. However, in determining whether the foundation evidence makes a

prima facie showing, the question is not whether it was or was not adequately explained away by the end of the trial. It is whether, assuming the trial court judge believed the foundation evidence and any reasonable inferences which could be made from it, and disbelieved any contradictory evidence, he could have found that the petitioner acted in concert with whoever it was that murdered his wife. Once such a finding is made, the rule is satisfied and the hearsay declarations are admissible. Respondent submits that the trial court was correct when it ruled that such a showing had been made. Therefore, even assuming the matter were of constitutional dimension, there has not been any abridgment of petitioner's federally protected rights.

III

The trial court's refusal to grant a new trial on the ground of newly discovered evidence did not deprive petitioner of a federally protected right.

Petitioner argues that the trial court erred when it denied his motion for a new trial based on newly discovered evidence. He alleges this ruling to be a denial of a federally protected right. The newly discovered evidence is of two types:

(A) The disposition of the charges which were pending against four witnesses when they testified in petitioner's trial.

(B) Witness Anderson's recantation and subsequent repudiation of the recantation.

Before examining the applicable law, it should be noted that in the trial the court followed the "Jencks" procedure (Cf. 18 U.S.C. §3500) and ordered respondent to turn over to petitioner's counsel the pretrial statements of all the witnesses in question during the cross-examination of them. On

appeal, the Minnesota Supreme Court adopted this procedure as part of the law of the state. *State v. Thompson* (II), *supra*, 139 N.W. 2d at 512.

Certain general rules govern the granting of a new trial on the ground of newly discovered evidence. Two of these are succinctly stated by the Court in *United States v. Lombardozzi*, 343 F. 2d 127 (2d Cir. 1963), cert. denied, 381 U.S. 938:

> "The grant or denial of a motion for a new trial is largely within the discretion of the trial court. Furthermore, such motions are 'not favored and should be granted only with great caution'. [Citation]." 343 F. 2d 128.

That the matter is addressed to the discretion of the trial court, accord, *Connelly v. United States*, 271 F. 2d 333, 334 (8th Cir. 1959), cert. denied, 362 U.S. 916.; *Gallegos v. United States*, 295 F. 2d 879, 881 (9th Cir. 1961), cert. denied, 368 U.S. 988. That such motions are not favored, see also *Connelly v. United States*, *supra*, 271 F. 2d at 334.

A. The disposition of the charges pending against witnesses Ingram, Sharp, Butler and Morris is not newly discovered evidence such as to entitle petitioner to a new trial.

Petitioner argues that the disposition of the criminal charges pending against the above four witnesses is ground for a new trial. He cites *Napue v. Illinois*, 360 U.S. 264 (1959), as controlling. *Napue* stands for the proposition that Due Process is offended if a prosecution witness giving important testimony also testifies that he did not receive any promise of consideration in return for his testimony when in fact he had, and the prosecutor knows it yet makes no attempt to correct the false testimony. Under this holding four elements must appear: (1) Testimony that no con-

sideration was given; (2) Consideration which was in fact given; (3) The prosecutor's knowledge of the consideration; (4) The failure of the prosecutor to correct the record.

Respondent agrees that (1) the witnesses testified that no promises were given and (2) that the prosecutor did not disagree with this testimony. However, there is not any evidence that any "deals" were made, and that if any were, that the prosecutor knew of it. The witnesses were all extensively cross-examined by petitioner's counsel, who had copies of the statements the witnesses had given to the police shortly after they were arrested and before they had any opportunity to confer with each other. No material discrepancies and no evidence of any "deals" were found. Petitioner's frenzied libeling of the prosecutor does not mask the fact that there is no evidence of any "deals" anywhere in the record. By contrast, in *Napue* the prosecutor actually admitted a promise of reduction of sentence, in a post-conviction proceeding undertaken by the prosecutor in behalf of the witness. Petitioner is asking this Court to infer that "deals" were made. Petitioner raised the identical argument before the trial judge. (R. Vol. I, p. LXXXI). The trial judge, ruling on the motion, noted that, "In response to the moving papers of defendant, the State has presented counter affidavits, statements and transcripts of testimony controverting the truth of defendant's moving papers." (*Id.* at LXXXII). The documents filed by the State, which are also of record in the court below, include affidavits of the prosecutor, William B. Randall, the witnesses Morris, Sharp, Ingram and Butler, and the attorneys who represented Morris, Sharp and Butler. Some 66 affidavits and exhibits were filed by the State, in the words of the trial judge, controverting the truth of defendant's moving papers. The trial court, who presided

over both the trial and the later hearing on a motion for a new trial, made the following finding:

> "The alleged promises of reward to Anderson, Morris, Sharp, Ingram and Butler, and the alleged leniency granted to each except Anderson, are at best inferences that they were encouraged to cooperate. In this case, there is absolutely no foundation for a conclusion that anyone induced either or any to testify falsely on behalf of the State, nor is there any showing that either or any did in fact falsify as to material matter. While the Court appreciates that all these men are criminals and that their credibility is subject to question, nevertheless, such was submitted and considered by the jury. No proposed 'newly discovered evidence' on this contention has been shown, and it is therefore rejected. (R. Vol. I, p. LXXXIV)."

The controlling rule is that upon a motion for a new trial on the ground of newly discovered evidence, the trial court's ruling should not be disturbed except under the most extraordinary circumstances, *Newman v. United States*, 238 F. 2d 861, 862, 863 (5th Cir. 1956). Nevertheless, petitioner continues to urge that the trial court's findings be disregarded, solely because of the disposition of the charges pending against the witnesses. If petitioner's contention is valid, it would mean that every time any witness who had a criminal charge pending against him testified, he would have to be dispatched to prison, lest the verdict in the case in which he testified be upset. In order to safeguard the verdict, prison would necessarily result in spite of any and all disclaimers of promises by the prosecutor and witnesses and in spite of any findings by the trial court that there were no promises. Prison would necessarily result in spite of the results of any presentence social and psychological investigation by trained personnel in the witnesses' own case.

Respondent certainly has no quarrel with the holding of *Napue*, other than to point out it has no relation to the facts of this case. Since there is no evidence of any kind showing that the witnesses were offered any "deals", the sole newly discovered evidence concerning witnesses Morris, Sharp, Ingram and Butler is the disposition of their cases. This evidence does not go to prove or disprove petitioner's guilt or innocence; it would merely go to the credibility of the witnesses. Even assuming that this matter were one of constitutional dimension, and could be reviewed by this Court on certiorari to a state court, it can be seen that the trial court acted correctly. The rule is clear that newly discovered evidence which goes merely to the credibility of the witnesses is not ground for a new trial. *United States v. Lombardozzi, supra*; *Beyda v. United States*, 324 F. 2d 526, 531 (9th Cir. 1963). Respondent submits with respect to the witnesses Morris, Sharp, Ingram and Butler, there is no ground for granting petitioner a new trial.

B. Anderson's recantation and subsequent repudiation of the recantation is not ground for granting a new trial.

After petitioner and Mastrian were convicted, Anderson entered a plea of guilty to murder in the first degree. He was incarcerated in the state prison where Thompson and Mastrian had previously been sent. Sometime after Anderson arrived at the prison, authorities found on his person a partially completed letter addressed to the Governor of the State and the Chief Justice of the state supreme court. In this letter he recanted his testimony at the trial and completely exonerated petitioner. On July 8, 1964, the attorney who was handling petitioner's appeal to the state supreme court went to the prison, with a court reporter, to take a

statement from Anderson. The statement was taken at the prison with no attorney representing respondent. (R. Vol. 8, p. 360). In this statement Anderson reiterated what he had stated in the letter. Sometime thereafter Anderson was removed from the prison. The state supreme court remanded the case to the trial court, an appeal having been perfected in the interim, with instructions to hold a hearing on a motion for newly discovered evidence. At the hearing, in which Anderson was cross-examined by both counsel for petitioner and for Mastrian, Anderson repudiated both the letter and the statement made at the prison and testified that what he had said at the trial was true. (R. Vol. 8, pp. 446 *et seq.*). He testified that threats had been made on his life by Mastrian in the prison (*Id.* at 474) and that other threats had come from Thompson through the other inmates in the prison (*Id.* at 475). He testified that these threats were the sole reason why he wrote the letter and gave the statement to petitioner's counsel. (*Id.* at 461, 476). Petitioner now urges that based on this recantation and repudiation of the recantation he should be granted a new trial.

If courts look with disfavor upon motions for new trial based upon newly discovered evidence, they look with suspicion upon any motion grounded upon a recantation. *Johnson v. United States*, 291 F. 2d 150 (8th Cir. 1961), cert. denied, 368 U.S. 880. The rule that the findings of a trial judge, ruling on a motion for a new trial based on newly discovered evidence should be entitled to great weight, applies with more force when the trial judge is asked to reconcile conflicting evidence. *Connelly v. United States*, *supra*, 271 F. 2d at 335; *Newman v. United States*, *supra*, 238 F. 2d at 863; *Johnson v. United States*, *supra*, 291 F. 2d at 154.

In this case, the findings of the trial judge, at the conclusion of the final motion for a new trial, were clear. The court found that the letter addressed to the state officials and the statement given to petitioner's counsel were compelled by threats communicated to him by other inmates as having come from Thompson and Mastrian. The court said that, in its opinion, had Anderson not been incarcerated in the same institution as were Thompson and Mastrian, the statement and the letter would never have been forthcoming. (R. Vol. I, p. LXXXIV). The court found that Anderson's testimony at the trial was true and that his recanting letter and deposition were false. (*Id.*, p. XC).

The case of *Newman v. United States*, *supra*, is apposite. In this case the defendant was convicted of illicit whisky operations largely on the testimony of a paid government informer. The defendant then moved for a new trial based on newly discovered evidence. Attached to the motion was an affidavit of the informer to the effect that his trial testimony was false. Upon a hearing on the motion the informer subpoenaed by the Government, took the stand presumably to test the circumstances leading up to the recantation in the affidavit. A lawyer for the informer appeared and advised the latter of his right against self-incrimination. Without giving any testimony on the matter, the informer was excused as a witness on his plea of self-incrimination. The trial court denied the motion for a new trial. On appeal to the court of appeals, the trial court's ruling was affirmed. The court held that a recanting affidavit does not automatically lead to a new trial. Stating that the matter was within the discretion of the trial judge, the court held that there was ample basis for the trial judge to conclude that the trial testimony and not the affidavit was true. The case at bar is a stronger case than was *Newman*. In *Newman*, the

trial court had merely the original testimony and a recanting affidavit. In the case at bar, there is the original testimony, the recanting statement and letter, and the subsequent repudiation of the recantation by Anderson when called upon to testify by petitioner.

Johnson v. United States, *supra*, is also apposite. In that case defendant was convicted of the crime of falsely making and counterfeiting federal reserve notes with intent to defraud. The evidence showed that the crime had been committed by a conspiracy, and the wife of one of the co-conspirators testified against defendant. After his conviction defendant moved for a new trial based upon the contention that the wife had given false testimony. Attached to the motion for a new trial was the wife's affidavit that her testimony at the trial was erroneous. At the hearing on the motion the wife testified in support of the motion. The trial court denied the motion, finding that the testimony at the trial was correct and that the recantation was not worthy of belief, possibly being the result of a suggestion by the defendant. 291 F. 2d 154. On appeal, the court of appeals affirmed the denial of the motion for a new trial. The court said:

> "Courts look upon recantation with suspicion. The trial court, which has had the witness before it, is in a much better position to determine where the truth lies than an appellate court. An appellate court should not interfere with the trial court's findings which have evidentiary support. Motion for a new trial based upon factual considerations should not be tried de novo upon appeal." *Ibid.*

Petitioner's citation of *Douglas v. Alabama*, 380 U.S. 415 (1965), as being very much like the case at bar can only be the result of a complete misreading of *Douglas*. In that

case the defendant had been indicted on a charge of assault with intent to commit murder. An accomplice had been found guilty in a previous separate trial and was called by the State to testify against the defendant. The accomplice, planning an appeal, invoked his privilege against self-incrimination when the State started to question him on the material elements of the charge. The trial court declared the witness a hostile witness and gave the State the privilege to cross-examine him. The prosecutor then produced a statement which purported to be the confession of the accomplice. Under the guise of cross-examination to refresh the accomplice's recollection, the prosecutor read the entire statement in the presence of the jury, pausing every few minutes to ask the accomplice whether he made that statement. Each time the prosecutor did so, the accomplice asserted the privilege and refused to answer. This Court held that such a procedure violated the Due Process. The distinctions between *Douglas* and the case at bar are evident, and only a few will be touched upon here. In *Douglas*, the witness was called by the prosecution. In the motion for new trial herein, the witness was called by the petitioner who was permitted to cross-examine his own witness. In *Douglas*, the case was tried before a jury which very likely could have believed that the prosecutor's reading of the statement was, in fact, evidence. In the case at bar, the matter was heard by a trial judge, and the questions which Anderson refused to answer could have in no way been taken as substantial evidence. Finally, in *Douglas* this Court pointed out that the primary object of the constitutional provision in question was to prevent the use of ex parte affidavits in lieu of personal direct and cross-examination. In the case at bar, if there was anything ex parte, it was the material presented by petitioner;

certainly nothing ex parte can be attributed to respondent in this connection.

As can be seen, the entire discussion concerning Anderson's recantation and repudiation has assumed that the matter is one of constitutional dimension. Petitioner has cited no authority holding that this is the case. However, even assuming, for the purposes of this petition, that the matter were of constitutional dimension and this Court would be in the position of a court of review, is can be seen that petitioner has presented no ground for a new trial.

CONCLUSION

Petitioner has failed to show that the Court below decided any question so as to deprive him of any federally protected right. Wherefore, the Respondent State of Minnesota respectfully prays that the Court deny the Petition herein.

Respectfully submitted,

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